IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HOUGH ASSOCIATES, INC., a Delaware Corporation,	)	
Plaintiff,	)	
v.	)	C.A. No. 2385-N
MITCHELL A. HILL and BE&K ENGINEERING COMPANY, a Delaware Corporation,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: November 20, 2006
Date Decided: January 17, 2007

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STRINE, Vice Chancellor.

I. Introduction

Plaintiff Hough Associates, Inc. ("Hough") is a Delaware corporation in the business of providing engineering and design, fabrication, and on-site project management services for its clients. Hough filed this action alleging that defendant Mitchell Hill, one of Hough's founders and former stockholders, violated the "Non-Competition Agreement" he signed with Hough. That Agreement, among other things, prohibited Hill from working for any business providing services similar to Hough's within a 50 mile radius of Hough's headquarters for three years after Hill left Hough's employment.

Hill's primary operational role for Hough for over a generation had been leading a Hough team that provided electrical and instrument engineering ("E&I") services to E.I. du Pont de Nemours and Company ("DuPont") at DuPont's Edgemoor, Delaware facility ("Edgemoor"). In 1985, Hill forged the relationship between Hough and DuPont at Edgemoor, and, as Hough's on-site project manager, he has been instrumental in that relationship's continuation over the years. During the first sixteen years of this engagement, Hough worked under a direct contract with DuPont, but, since 2001, Hough has rendered its E&I services to DuPont as a subcontractor for the various prime contractors that have provided a larger array of engineering services at the plant. Thus, whether by direct contract or subcontract, Hough — through teams led by Hill — has continually done the E&I work at Edgemoor.

In July 2006, DuPont replaced CDI Engineering Group, Inc. ("CDI"), the prime contractor at Edgemoor since 2003, with defendant BE&K Engineering Company ("BE&K"). BE&K intended to "self-perform" the E&I work, without use of a subcontractor, and thus intended not to renew Hough's subcontract. But neither DuPont, CDI, nor BE&K promptly informed Hough of BE&K's intention. During the delay before Hough learned of this plan, BE&K met with Hill and presented him with an opportunity to join BE&K as an employee and head up the E&I unit that BE&K planned to create and station at Edgemoor. Before discussing the substance of this opportunity, Hill presented BE&K with copies of the Non-Competition Agreement. But, neither Hill nor BE&K endeavored to abide by its clear terms. During his meeting with BE&K, Hill discussed his Hough subordinates with BE&K and recommended that they also be hired by BE&K. For its part, BE&K made Hill aware that he had a job with them if he so desired, and encouraged him to keep Hough in the dark about their plans.

On June 27, 2006, BE&K made formal offers of employment to Hill and the rest of his Hough E&I unit (the "E&I Team"). All agreed to accept. Thus, when BE&K took over as the prime contractor, it was able to simply plug the old Hough E&I Team into its own operations and provide DuPont with seamless service while leaving Hough itself out in the cold. Only after the entire Hough unit was signed up did Hill fully inform Hough of the state of affairs at Edgemoor. By that time, it was too late for Hough to prevent the inevitable loss of its employees and its business. This suit ensued.

In this action, Hough alleges that Hill breached the Non-Competition Agreement by accepting a nearly identical position with BE&K and by soliciting his Hough subordinates to join him in his new job. Further, Hough alleges that BE&K tortiously interfered with the contractual relationship between Hough and Hill set forth in the Non-Competition Agreement by hiring Hill and by conspiring with him to deprive Hough of its experienced E&I Team and thus of any opportunity to retain the lucrative, long-term business relationship Hough had established at Edgemoor.

Two motions are now pending before me. Hough seeks a preliminary injunction prohibiting Hill and BE&K from continuing to provide E&I services at Edgemoor, and from otherwise engaging in concerted activity that would violate Hill's Non-Competition Agreement. As a defense to that motion, Hill filed a motion to compel arbitration, arguing that Hough had contractually agreed to arbitrate any claims under the Non-Competition Agreement.

In this opinion, I begin by addressing Hill's motion to compel arbitration. Because all of the substantive claims in this case arise from the Non-Competition Agreement, which does not mention arbitration, I conclude that this court is a proper forum to resolve the pending dispute. Although a separate "Stock Purchase Agreement," which contains the arbitration clause Hill seeks to enforce, was executed on the same day as the Non-Competition Agreement (together, the "Agreements"), each of the Agreements has an integration clause that manifests its independence. Moreover, the Non-Competition Agreement contains a specific

remedial section addressing injunctive relief, which mandates fee-shifting in the event of Hill's breach. That section never references arbitration and its provision on fee-shifting is directly contrary to the provision addressing attorneys' fees in the remedial section in the Stock Purchase Agreement. Furthermore, no absurdity arises from concluding that the parties decided to approach dispute resolution differently under the two Agreements. The reality that covenants not to compete often give rise to expedited suits for injunctive relief against not only the employees they bind but also non-signatory third parties alleged to have tortiously interfered with those contractual relationships could have motivated the drafters to permit Hough to seek relief for a breach of the Non-Competition Agreement in a court, rather than before an arbitration panel. Therefore, there is no basis to find that the parties agreed to arbitrate any claims stemming from their Non-Competition Agreement.

From there, I turn to Hough's motion for a preliminary injunction. Applying the familiar standard, I find that Hough has established a reasonable probability of success on the merits for both its breach of contract and its tortious interference with contract claims, that Hough has suffered and will continue to suffer irreparable harm in the absence of an injunction, and that on balance, the equities in this action favor issuing the preliminary injunction.

On the merits prong of the inquiry, Hough has easily shown a reasonable probability of success on its claims. The Non-Competition Agreement plainly prohibits Hill from working in the position in which he is currently employed, and

Hill and BE&K both knew that at the time he was hired. BE&K's defense — that it read the plain words but made a conscious choice not to understand them — is, if anything, an admission that it knew it was hiring someone who could not legally take the job. Consistent with that inference, the record reflects that BE&K and Hill sought to conceal their activities from Hough at a time when it might have been possible for Hough to take steps to retain its employees and preserve its position at Edgemoor. Put simply, at a time when Hough, more than ever before, needed its key employee, Hill, to be candid about developments at Edgemoor and to assist Hough in preserving its business there, Hill instead proceeded to dishonor clear provisions of his Non-Competition Agreement and to help BE&K hire his entire unit. As a result of BE&K's and Hill's actions, three of Hough's former E&I Team members — Hill, Ralph Draper, and Anthony Ancarrow — are now performing the same work, at the same desks, with the same responsibilities at Edgemoor as they had been while working for Hough, but they are now generating profits for BE&K.

Under settled principles of law, Hough faces a threat of irreparable injury from the acts of Hill and BE&K. In his Non-Competition Agreement, Hill acknowledged a breach would justify the entry of injunctive relief, and Delaware law has enforced such agreements in large measure because after-the-fact attempts to quantify the damages from breaches of this kind involve costly exercises in imprecision. Indeed, despite encouragement from the court, the parties were unable to resolve this dispute amicably precisely because they were in different

solar systems about the economic harm suffered by Hough as a result of the misconduct at issue.

Finally, given the record, Hill and BE&K are in no position to complain about the equities of an injunction. Their position — that Hough suffers no hardship under the status quo because it had no reasonable expectation of keeping its work at Edgemoor, while both Hill and BE&K will be harmed if an injunction issues — elides the purpose of the Non-Competition Agreement that Hill signed and BE&K knew of. That Agreement sought to prevent the current status quo from ever materializing and provided, with Hill's assent, that Hough faced irreparable harm and was entitled to injunctive relief in the event that it did. As a result, it is more equitable on balance to protect Hough's legitimate contractual expectations and to shield it from further improper competition from Hill and BE&K.

The practical effect of the preliminary injunction I will order is that for its duration neither Hill nor BE&K will be permitted to provide any E&I services at Edgemoor that Hough has previously supplied there, and Hill will be prohibited from engaging in any engineering, design, fabrication, or other services comparable to those provided by Hough within a 50 mile radius of Hough's headquarters. To minimize the negative externalities of this order, I note that the scope of this order does not extend to the two other ex-Hough employees hired by, and now working for, BE&K at Edgemoor. Although these individuals, namely Mr. Ancarrow and Mr. Draper, will be restricted from working at Edgemoor as

employees of BE&K, nothing in the order I will enter will prohibit them from performing their current functions directly for DuPont or indirectly through a contractor other than BE&K.

II. Factual Background

These are the facts as I find them for purposes of ruling on this motion for a preliminary injunction.

A. The Parties

Hough was founded by Dick Hough, Tom Bombico, Harry Kamerer, Bill Simpson, and Mitch Hill in April 1977. Originally, Hough was controlled by its eponymous founder Dick Hough, with Bombico, Kamerer, Simpson and Hill owning minority interests. During 1993 and 1994, Dick Hough and Harry Kamerer sold their shares back to the company and left the scene. Thus, as of October 2005, when the Agreements at issue in this case were signed, Hill, Bombico, and Simpson were equal co-owners of the business.

From its founding, Hough has provided engineering and design, construction and project management, fabrication, assembly, and other services. Typically, Hough provides on-site teams to clients to assist with daily project management and support either as contractors of the client or subcontractors under other companies. When stationed on-site, Hough employees develop specialized knowledge and expertise that allows them to better serve the clients' needs.

DuPont was one of Hough's largest and longest-standing clients. Hough began providing on-site E&I teams to Edgemoor in 1985. From the start of this

relationship, Hill was the Hough project manager responsible for this business and oversaw a small team of Hough employees located at that facility.

Over the next 20 years, while other contractors came and went, Hough and Hill remained fixtures at Edgemoor. From 1985 to 2001, Hough provided its services under a direct contract with DuPont. In April 2001, DuPont selected BE&K to become the prime contractor for outside services at Edgemoor. This did not displace Hough from providing E&I services at the site. Rather, Hough continued to provide the same services and simply became a subcontractor under BE&K. Two years later, in February 2003, DuPont replaced BE&K with another prime contractor, CDI. Though this transition was fraught with high turnover, Hough continued its role as E&I provider. The only change was that Hough performed its work under a subcontract with CDI instead of BE&K.

In each of their various forms, Hough's contracts (and subcontracts) at Edgemoor were consistently profitable. DuPont was one of Hough's two primary clients, who together generated nearly 80% of the company's revenues. The E&I services Hough provided at Edgemoor allowed the firm to pay substantial bonuses in successful years and helped the firm during times when other aspects of its operations were not doing well. For example, when Hough as a whole showed a net loss in 2005, its E&I Team at Edgemoor allegedly generated profit in excess of

$190,000 on its subcontract, and Hill, himself, was believed to have contributed over $56,000 to Hough's bottom line.[1]

B. The Growing Tension Between Hough And Hill

As the twenty-first century began, Hough was not in great shape. In 2002, Hough did not show a profit, and during the period from 2003 through 2005, Hough reported cumulative losses of over half a million dollars.[2] In order to sustain its operations, Hough borrowed heavily to meet payroll and other obligations. Hough took out a $150,000 line of credit, increased it to $250,000, and eventually resorted to the use of advances from a company credit card to cover its operating deficits.

By 2005, Hough's debts approached $290,000.[3] As one of the three owners of the corporation, Hill had signed a personal guarantee on the line of credit and was jointly liable on these debts along with Simpson and Bombico. But, in reality, Hill and Bombico bore a larger portion of the actual exposure because Simpson's personal financial condition left him unable to cover his share if Hough's loans were ever called.[4]

This exposure made Hill nervous. For many years, Hill complained about the way Hough's finances were managed, but no changes were instituted. By

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[1] Cuff Dep. at 38; Bombico Dep. at 115-16, 119-20.
[2] Cuff Dep. at 34-35.
[3] *See* Affidavit of Etta R. Wolfe ("Wolfe Aff."), Ex. 75 (showing a balance $38,283.30 on the corporate credit card) *and* Wolfe Aff., Ex. 76 (showing a balance of $249,649.59 on Hough's line of credit).
[4] Wolfe Aff., Ex. 30-31.

January 2004, Hill was so upset about the state of Hough's finances that he offered to surrender his stock in exchange for a release from his obligations on the corporate debts.[5] When no progress was made by early 2005, Hill approached Jim Cuff, Hough's president at the time, and made an increased offer in which he proposed to forgo his accrued vacation and sick time, valued in excess of $20,000, in addition to surrendering his stock.[6] Although Cuff agreed to look into the matter, he was unable to resolve the issue before it came to a head in March 2005.[7] At that time, Hough did not have adequate cash reserves to meet its payroll obligations and sought contributions from its shareholders. Hill refused and reasserted his demands to sell his shares back to the company. Because of his own poor financial condition, Simpson also did not contribute toward Hough's operating shortfall. Like Hill, Simpson offered to surrender his shares.[8]

Bombico — the other remaining shareholder and guarantor — initially refused to consent to these surrenders because to do so would mean assuming the full corporate liability. Eventually, however, he relented and agreed in principle to Simpson's and Hill's demands, provided that Hill and Simpson — who both sought to remain as employees of the firm — each enter into a new, and more stringent, Non-Competition Agreement.

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[5] Wolfe Aff., Ex. 28.
[6] Hill Dep. at 99-102.
[7] *Id.* at 104; Wolfe Aff., Ex. 30.
[8] Wolfe Aff., Ex. 31.

C. The Agreements Between Hough And Hill

In April 2005, Bombico tendered drafts of the Stock Purchase Agreement and the Non-Competition Agreement to Hill and Simpson for review. Several months of negotiations ensued. Those negotiations ultimately resulted in a small change to the Non-Competition Agreement and a 50% reduction in the value of the accrued vacation and sick time Hill was conceding in the deal. Bombico and Hough remained firm, however, on the scope of the Non-Competition Agreement's covenant not to compete when Hill sought to alter it to mirror a more lenient covenant contained in a prior Hough shareholders agreement. Bombico refused to accept that less-stringent language, ultimately presenting the more-stringent terms on a take-it-or-leave-it basis. At that point, Hill decided that the benefits of executing the Stock Purchase Agreement and the Non-Competition Agreement, as written, outweighed the risks of continuing to guarantee Hough's indebtedness and therefore signed both Agreements on October 19, 2005.

The Stock Purchase Agreement, entered into by Hill and Hough, provided the Hill would sell and Hough would buy all of Hill's stock in the corporation for "total consideration" of $1.00, which was agreed to represent the "net book value adjusted by fringe benefits, salaries, and deferred compensation."[9] Additionally, the Agreement states that Hough will "use its best efforts to remove [Hill] as a

[9] Wolfe Aff., Ex. 74 at § B.

guarantor"[10] on the corporation's line of credit, and contains an arbitration clause and an integration clause. The arbitration clause, which Hill attempts to enforce here, submits "[a]ny disagreement between the parties" to arbitration and provides that "[i]n the event of arbitration, the parties shall bear their own costs, including attorneys' fees."[11] The integration clause states that the promises contained in the Stock Purchase Agreement represent the "complete and exclusive statement of agreement" between the parties.[12]

Although the Non-Competition Agreement and Stock Purchase Agreement were signed on the same date, they are separate Agreements that function independently and contain their own terms designed to satisfy their own unique objectives.

The Non-Competition Agreement, executed by Hill, Hough, and Bombico, limited Hill's ability to use the contacts, skills and confidential information that he gained while a shareholder and director of Hough to compete with Hough in the event that he left the company's employ. This new Agreement was more exacting than Hill's previous covenant not to compete, but it recited Hill's release from the roughly $290,000 in corporate debts and Hough's repurchase of his shares as consideration for its increased restrictions. Specifically, the Non-Competition

[10] *Id.* at § D.
[11] *Id.* at § E(2).
[12] *Id*. at § E(8).

Agreement enumerates three categories of restrictions that Hill, as the Seller, agreed to in consideration of these acts.

First, the Non-Competition Agreement prohibits Hill from associating with any of Hough's competitors or former clients while employed by Hough or after the termination of his employment.[13] Specifically, the Non-Competition Agreement restricts Hill's ability to work for a competitor in § 1(a):

> No Competition. Seller agrees for a period of five (5) years following the date of this Agreement or three (3) years after Seller's termination of employment with the Company, whether such termination is voluntary or for cause, whichever . . . is greater (hereinafter referred to as the "Non-Compete Period"), that he shall not directly or indirectly, either individually or with others, own, manage, operate, or control . . . or be employed by, serve as officer or director of, or consult or assist with, or participate in the management of, any business which is similar to the business conducted by the Company within a geographical radius of fifty (50) miles of the Company's business . . . . For purposes of this Agreement, the business of the Company includes engineering and design services, fabrication and assembly of racks, analyzers, and enclosures, and field services for various equipment and processes. . . .[14]

[13] To the extent that BE&K might be classified as one of Hough's clients because it had previously purchased and resold Hough's subcontractor services, the Non-Competition Agreement's restrictions regarding clients are even broader than those regarding competitors. Specifically, in § 1(b), Hill agreed that "during the Non-Compete Period he [would] not directly or indirectly, either individually or with others, own, manage, operate, or control . . . or be employed by, serve as officer or director of, or consult or assist with, or participate in the management of, any client of the Company or any entity that has paid for any service provided by the Company." Wolfe Aff., Ex. 46 at § 1(b).
[14] *Id.* at § 1(a).

Second, the Non-Competition Agreement prohibits Hill from soliciting the accounts or employees that Hough had cultivated.[15] Of particular note, here, is § 1(c), which governs Hill's relationship with Hough's employees:

> No Solicitation of Employees. Seller agrees that during the Non-Compete Period he shall not, directly or indirectly, on Seller's own behalf or in the service or on the behalf of any person or entity, hire, solicit, take away, or attempt to hire, solicit, or take away any employee, consultant, independent contractor, or other personnel of the Company.[16]

Third, the Non-Competition Agreement constrains Hill from disclosing any of the confidential information he learned as a Hough employee, stockholder, and director after the termination of his employment with Hough.[17]

In the event that Hill ever materially breached any of these restrictive covenants, he agreed, in the Non-Competition Agreement's remedy clause, that "money damages alone would be an inadequate remedy," that such breach "would cause immediate and irreparable harm to the Company," and that he would

[15] Although Hough does not seek to specifically enforce this section of the Non-Competition Agreement, § 1(d) prevents Hill from poaching Hough's clients or accounts. *See* Wolfe Aff., Ex. 46 at § 1(d) ("Seller agrees that during the Non-Compete Period he shall not, directly or indirectly, on Seller's own behalf or in the service or on the behalf of any person or entity, hire, solicit, take away, accept, or attempt to hire, solicit, take away, or accept any client, customer, or account of the Company or the Company's customers.").

[16] *Id.* at § 1(c).

[17] Wolfe Aff., Ex. 46 at § 1(e). In § 1(e), Hill pledged that "during or after the term of this Agreement, [he would not] disclose . . . confidential information [about the company, and its customers and clients], or any part thereof, to any person, firm, corporation, [or other entity]." *Id.*

"reimburse the Company for any and all reasonable attorneys' fees and costs incurred as a result of [his] breach of this Agreement."[18]

Finally, to manifest its independence, the Non-Competition Agreement includes an integration clause. That provision relays the parties' acknowledgement that the Non-Competition Agreement "sets forth the entire agreement and understanding" between the parties and "supersedes all prior agreements relating to this subject."[19] Notably, the Stock Purchase Agreement is not listed in the Non-Competition Agreement's integration clause.

After executing these Agreements, Hill ceased to be a stockholder or director of Hough, but he remained an employee of the company. In this capacity, Hill continued to work as a project manager at Edgemoor until BE&K ousted Hough from its historical role there as E&I contractor.

D. The 2006 Transition At Edgemoor

As early as November 2005, DuPont began re-thinking how it procured necessary outside services for its facility in Edgemoor. DuPont was unhappy with its current prime contractor, CDI, because it had been unable to attract and retain competent resources to supply Edgemoor's engineering needs at the cost and quality levels DuPont expected.[20] In an attempt to correct the problem, DuPont discussed its concerns with CDI and gave the company until the end of the first

[18] Wolfe Aff., Ex. 46 at § 2.
[19] *Id.* at § 3(h).
[20] Gold Dep. at 9-10.

quarter of 2006 to show substantial improvements. At the same time, DuPont, perhaps at BE&K's instance, saw BE&K's return to Edgemoor as a solution. Although BE&K was no longer providing services at Edgemoor, it had remained a contractor with DuPont at several large facilities in various states during the period after its termination at Edgemoor.[21] Ultimately, when CDI did not demonstrate the progress DuPont desired, DuPont looked to BE&K as a replacement contractor.

In evaluating BE&K as a candidate to take over its Edgemoor facility, DuPont looked favorably on BE&K's history of completing site team transitions with very high employee retention.[22] In these transitions, BE&K employed a strategy of bringing the leaders on board first before targeting their subordinates. That approach worked to near perfection, achieving a 99% retention rate, when BE&K assumed leadership of DuPont's Yerkes facility near Buffalo, New York in 2005 — a result DuPont hoped to replicate at Edgemoor.[23] In fact, DuPont encouraged BE&K to utilize the same strategy of "bring[ing] on board the leader first" and to make retention of current site team leadership BE&K's "first priority" at Edgemoor.[24]

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[21] BE&K "has been serving DuPont for 15 years" by completing projects from its home office by staffing various site teams. Affidavit of Timothy M. Holly ("Holly Aff."), Ex. T at BEK00090. Those teams are stationed at DuPont facilities in Delaware, New York, Iowa, Virginia, and Michigan. Yanchitis Dep. at 5.
[22] Gold Dep. at 65.
[23] *Id.*
[24] *Id.*; Holly Aff., Ex. T at BEK00091.

BE&K therefore knew that DuPont valued incumbents. Further, BE&K understood that while DuPont was receptive to streamlining its costs at Edgemoor, it was simultaneously concerned about losing on-site knowledge and capabilities if reducing expenses involved a high turnover of employees.[25] In fact, DuPont expressed that if BE&K proved unable to provide a capable E&I team by recruiting Hough's incumbents or by supplying an acceptable alternative team, DuPont might have forced BE&K to keep Hough as a subcontractor for the E&I work it had historically performed.[26] In recognition of these concerns, BE&K, in its proposal to DuPont, stated that it "would find it unacceptable not to recruit some of the incumbents" and pledged to "work aggressively to recruit existing personnel."[27]

Based on these understandings, BE&K targeted Hill and the other members of Hough's E&I Team as early as May 2006. In this process, Hill was doubly valuable to BE&K. In his own right, Hill was an important asset because DuPont regarded him as "key"[28] to the transition's success due to his "technical knowledge of the site that would be very difficult to replace."[29] As importantly, BE&K

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[25] *See, e.g.*, Holly Aff., Ex. DD at DP0042-43 (demonstrating that DuPont viewed the opportunity to consolidate E&I work as a "pro" for transitioning to BE&K but also reflecting DuPont's concern about losing "knowledgeable resources" who possessed "familiarity with site personnel and current projects").
[26] *See* Wolfe Aff., Ex. 63 at DP0210 (stating that DuPont would "continue with same arrangement via Hough" as a "last resort").
[27] Holly Aff., Ex. T at BEK00094.
[28] Wolfe Aff., Ex. 13.
[29] Hall Dep. at 64; *see also* Wolfe Aff., Ex. 10 (describing Hill as a "lead candidate" in the E&I arena).

valued Hill because of his leadership position and his ability to influence his subordinates, all of whom were listed among the 24 "keepers"[30] who DuPont and BE&K felt were strong candidates for continued employment at Edgemoor.[31]

By early June, DuPont's accepted BE&K's recruiting plan and decided to replace CDI with BE&K. That decision was announced to CDI's leadership on June 14. BE&K was slated to take over full responsibility at Edgemoor on July 10.

CDI was quickly told of the transition by DuPont because it had a contract with DuPont. But neither DuPont nor BE&K officially informed Hough of the transition, allegedly because Hough's contractual relationship was only with CDI. Further, because Hough had not received official notice of the transition by June 19, the date of BE&K's informational meeting for CDI on-site employees, Hough's E&I Team was not invited to the meeting. But news of the transition had spread amongst the employees at Edgemoor such that Hough's E&I Team knew that change was in the air, and as a result, one of the team members, Ancarrow, attended anyway. The next day, June 20, Ancarrow discussed the information he heard at the meeting with his co-workers from Hough. Concerned about their job security and intrigued by BE&K employment opportunities, Hill's subordinates,

[30] Wolfe Aff., Ex. 13.
[31] *See* Gold Dep. at 62-65 (describing BE&K's strategy of hiring site team leaders first in order to influence their subordinates to also transition to BE&K and identifying Hill as "the strongest E&I leader at the site" and someone whose hire "would be perceived as a positive within the rest of the organization").

Draper and Ancarrow, e-mailed BE&K to express their interest in potential employment.

That same day, Hill e-mailed Hough to convey the latest facts as he knew them in connection with the transition. In that e-mail he told Hough that "CDI was out at [Edgemoor] and BE&K was in," informed Hough of the meeting that took place the prior day, and promised to "continue to keep [Hough] factually informed . . . moving forward."[32] Further, Hill told Hough: "There has been absolutely no solicitation of [Hough] employees, in any way, shape or form, on the part of BE&K."[33] What Hill failed to say was that he knew Ancarrow had attended the June 19 meeting. Even more important, Hill failed to tell Hough that he himself was planning on reaching out to BE&K as well that very afternoon to find out how he could learn more about BE&K's job offerings.[34]

The day after Hill's e-mail, Hough was officially notified that its subcontract with CDI would soon be terminated. On June 21, CDI sent an e-mail to Bombico and each of Hough's on-site employees stating that, as of July 9, "all CDI billings for the site team will cease . . . includ[ing] the 3rd Party arrangement . . . for Hough Associates employees."[35]

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[32] Wolfe Aff., Ex. 48.
[33] *Id.*
[34] *See* Wolfe Aff., Ex. 22-23 (describing Hill's conversation with BE&K on June 20); Hill Dep. at 207, 214 (confirming that Hill inquired who he should contact at BE&K to find out more about job opportunities).
[35] Wolfe Aff., Ex. 49. Upon receiving this e-mail and noting that Bombico was the only member of Hough's board listed as a recipient, Hill forwarded it the other four members of Hough's executive committee. *Id.*

On June 22, after learning "that the notification to Hough was official," BE&K followed up on Hill's inquiry with a telephone call and arranged an interview for him on the morning of June 23.[36] At that interview, Hill met with three of BE&K's executives — Art Yanchitis, Keith Reece, and Pete Hall — for about two hours. In the course of that meeting, Hill discussed his own career options as well as those of his Hough team members at Edgemoor.

Regarding his Hough subordinates, Hill highly recommended them to BE&K, calling them "incredible guys" and "people he was proud to be on a team with."[37] Hill admitted that he raised their names because he "knew at that point that all three of them were going to be applying for jobs at BE&K" and because he wanted BE&K to know that he had "interfaced with all three of them for quite some period of time" and "held them in the highest regard."[38]

As for his own career opportunities, Hill informed BE&K of his covenant not to compete and provided Yanchitis, Reece, and Hall with three copies of the Non-Competition Agreement to review.[39] Thereafter, "a lengthy discussion on the content" of that Agreement and the potential for Hill to work for BE&K without violating its terms followed.[40] Ultimately, the BE&K executives told Hill that they would not give him any legal counsel regarding his covenant not to compete,

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[36] Wolfe Aff., Ex. 17.
[37] Hill Dep. at 235-38.
[38] *Id.* at 236.
[39] *Id.* at 241-42.
[40] *Id.* at 242-43.

but that they "would be interested in [Hill's] being part of [their] organization" and that they would "throw out a job offer . . . for [Hill's] consideration" early the following week.[41]

Consistent with BE&K's strategy of bringing the leader on board first, after Yanchitis finished meeting with Hill, he contacted Hill's subordinates to respond to the e-mails they sent days earlier, to request their resumes, and to arrange for them to interview with BE&K on the following Monday morning, June 26.[42] Those interviews were little more than perfunctory, given Hill's strong recommendations in their favor. After speaking with Hill again on June 23, Yanchitis apprised DuPont that "interviews with Hough personnel are set for Monday, June 26, 2006" and that "offers are expected on June 27, 2006."[43] In accord with its expressed intention, BE&K made offers to Hill, Draper, and Ancarrow on June 27.

While BE&K was interviewing and extending offers to Hough's employees, Hough remained ignorant of its employees' plans to defect to BE&K. As Hough's project manager at Edgemoor, Hill was Hough's eyes and ears at the site. Yet the only information regarding developments at the site between his June 21 e-mail and a second message he sent on June 28 was that which could be gleaned from his July 26 timecard, indicating that he spent five hours of non-

[41] *Id.* at 242, 244-45.
[42] Wolfe Aff., Exs. 2, 8.
[43] Wolfe Aff., Ex. 19 at 4-5.

billable time during the preceding week conducting "CDI/BEK Status [Meetings]," including two hours on Friday, June 23.[44] On June 26, when Hill submitted that timecard, Bombico e-mailed him to find out what transpired at his meeting on Friday.[45] Illustrating that his failure to remain in contact with Hough was not benign, Hill did not respond to Bombico's inquiry until two days later on June 28 — at a time when he and his E&I Team members each had offers in hand from BE&K.

During this time period, Hill was complicit with BE&K in denying Hough information regarding BE&K's activities. Until it received Hill's e-mail on June 28, Hough was unaware that its subcontract would not be renewed by BE&K in the same way that it had been during previous transitions. In that e-mail, Hill told Hough for the first time that its services would not be needed going forward and that "BE&K [was] positioned to take over the contractual obligation in its entirety."[46] Hill, as a veteran project manager, obviously understood much earlier that the future of Hough's subcontract was implicated by BE&K's solicitation of himself and his team. Yet, he kept these developments from Hough until he knew that he and "his three boys" would be taken care of by BE&K.[47]

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[44] Wolfe Aff., Ex. 52.
[45] Wolfe Aff., Ex. 53.
[46] Wolfe Aff., Ex. 54.
[47] Bombico testified that Hill told another Hough employee that he had "taken care of his three boys" — i.e., the other ex-Hough employees — in the course of the transition. Bombico Dep. at 142-43.

Even on June 28, Hill was not completely forthcoming with Hough. In an e-mail he sent that day, which purported to share the "latest facts" as Hill knew them, he did not disclose that he or any member of Hough's E&I Team had interviewed with BE&K, been extended offers, or planned to accept them.[48] But, Hill knew all of those facts to be true. Less than 45 minutes after sending his note to Hough, Hill sent an e-mail to Jim Gold, his contact at DuPont, saying:

> ***Between you and me and not shared with Tom [Bombico] and Jim [Cuff] is the fact that Ken [Kincaid], Ralph [Draper], Anthony [Ancarrow] and I have all been made offers [by BE&K] and are willing to accept them moving forward.***[49]

Rather than tell the whole truth, Hill only told Hough that the E&I Team members had "begun exploring alternative possibilities, whatever they may be and wherever they may be."[50]

BE&K encouraged Hill's misdirection and secrecy. Shortly after e-mailing DuPont, Hill confirmed Hough's ignorance to BE&K, saying, "No one at the Hough office is aware of the fact that interviews and subsequent employment offers have taken place."[51] In response, BE&K instructed Hill not to "relate anything until we have signed acceptances."[52] Similarly, BE&K made no independent effort to apprise Hough of its solicitations of Hill or any other

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[48] Wolfe Aff., Ex. 54.
[49] Wolfe Aff., Ex. 55 (emphasis added).
[50] Wolfe Aff., Ex. 54.
[51] Wolfe Aff., Ex. 24.
[52] Wolfe Aff., Ex. 58.

members of the E&I Team, even when it knew Hill had a covenant not to compete. It also failed to extend to Hough the courtesy it gave to CDI of a direct correspondence indicating that BE&K intended to self-perform the entire prime contract at Edgemoor, including the E&I work Hough had historically performed. In fact, when CDI inquired whether it should include the fact that BE&K planned on self-performing the E&I work in its notice to Hough, BE&K said no, and instead, had CDI inform Hough that it was "going to be contacted by others regarding their participation going forward at the site"[53] — a communication that never came. Put simply, BE&K sought to keep Hough in the dark as long as possible. Consequently, Hough did not know it was out of work or that its employees were even considering leaving until Hill's email on June 28.

As a result of this intentional withholding of information, BE&K reaped the rewards of employing Hough's E&I Team — which included delivering an experienced on-site team to its client, DuPont, and crippling its prime competitor, Hough — without any opposition.

E. The Aftermath Of The 2006 Transition

Having acquired Hough's entire E&I Team, BE&K assumed the prime contract and took on the role of E&I provider at Edgemoor on Monday, July 10. On that day, the E&I Team returned to the same jobs, the same desks, and the same work assignments they had left the previous Friday as Hough employees but

[53] Wolfe Aff., Ex. 49.

did so working for BE&K.[54] For these individuals, and for DuPont, nothing changed except the company name on paychecks and bills. In fact, Hill acknowledged that his responsibilities were nearly identical in an e-mail he sent to a friend on his first morning of work with BE&K:

> I resigned from the little engineering firm that I had been part of for the past 29+ years just (3) weeks ago. ***I am working with another firm basically doing the exact same work as before and at the same location*** (DuPont Edge Moor plant) for the time being.[55]

For Hough, the results were dramatically different. Despite executing a Non-Competition Agreement with Hill, Hough lost to its direct competitor the services of the experienced and profitable employee it bound with that Agreement, the valuable relationship he had helped forge, and the team of employees he had trained to perform that work.[56] To put it mildly, Hough was crippled by the concerted efforts of Hill and BE&K. Consequently, Hough filed suit to enforce Hill's Non-Competition Agreement and to stop BE&K from continuing to interfere with that contract by employing Hill and providing E&I services at Edgemoor.

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[54] Hill returned to Edgemoor the following Monday, July 17, when he got back from a family vacation.

[55] Wolfe Aff., Ex. 89 (emphasis added).

[56] *See* Hill Dep. at 17-19 (describing how Hill forged Hough's relationship with Edgemoor over twenty years ago); *id*. at 60-61, 141 (explaining that Hill, unlike other Hough employees, was "a hundred percent billable"); Cuff Dep. 38 (attempting to quantify the E&I Team's contribution to Hough's profits).

On August 30, 2006, Hough served its complaint and its motion for preliminary injunction. Expedited discovery ensued and was completed on October 13, 2006. An oral argument was held on November 1, 2006, and after that, the parties again considered whether they could resolve their differences voluntarily. On November 20, 2006, the parties reported that those efforts had failed. While the court was considering its decision on these matters and just days before it issued its opinion, on January 11, 2007, Hill informed the court by letter than he would be terminating his employment with BE&K as of January 31, 2007 and will soon commence a new job in an unrelated field.[57] BE&K, however, has expressed no plan to cease providing E&I services at Edgemoor absent a court order.

III. Legal Analysis

I address Hill's argument that Hough must arbitrate its claim first as it presents a threshold question of this court's authority to rule on Hough's motion. After deciding the arbitrability issue, I turn to the merits of Hough's preliminary injunction claim.

A. Hough's Claims Are Not Subject To An Agreement To Arbitrate

Hill's assertion that this case must be arbitrated is an odd one in that it finds no basis in the text of the Non-Competition Agreement that he signed with Hough. Instead, Hill seeks to invoke the arbitration clause contained in the separate Stock

[57] Letter from G. Kevin Fasic, Esq., Counsel to Hill, to the court (Jan. 11, 2007) ("Fasic Letter") at 1.

Purchase Agreement, by arguing that that clause was somehow silently intended to govern actions to enforce the Non-Competition Agreement. For the following reasons, I do not embrace that argument.

The Non-Competition Agreement, which contains Hill's covenant not to compete, does not require arbitration. To the contrary, it contains a remedial clause granting Hough (the Company) the right to seek injunctive relief against Hill (the Seller) and to force Hill to reimburse Hough for any costs and fees expended in prosecuting that action. Specifically, the Non-Competition Agreement provides:

> The parties agree Seller's relationship with the Company is unique and special; that in the event of Seller's material breach of this Agreement or any of its provisions, money damages alone would be an inadequate remedy; that any breach by Seller of the [covenant not to compete] would cause immediate and irreparable harm to the Company; that in the event of any breach of this Agreement by the Seller, the Company, in addition to any remedies the Company may have at law, shall have the right to equitable relief, including injunctive relief, against Seller without posting bond. Seller agrees to reimburse the Company for any and all reasonable attorneys' fees and costs incurred as a result of Seller's breach of this Agreement, including any and all reasonable attorneys' fees and costs necessary to establish a right to fees and costs under this paragraph.[58]

[58] Wolfe Aff., Ex. 46 at § 2.

This remedial provision never references arbitration or otherwise suggests that Hough could not obtain the contemplated injunction through an action in a court of equity.

In the face of the Non-Competition Agreement's silence as to arbitration, it is impossible to infer an implicit contract between the parties to use arbitration to resolve disputes arising under that Agreement simply because the parties agreed to arbitrate other disputes arising under the Stock Purchase Agreement. To do so would be to slight two express provisions of the Non-Competition Agreement — its integration and remedial clauses.

To incorporate the arbitration clause of the Stock Purchase Agreement into the Non-Competition Agreement would ignore those Agreements' actual words in favor of a judicial determination that the parties must have intended to create one jointly integrated contract. Although that might have been a sensible way for the parties to have chosen to proceed, the job of the judiciary is not to implement what appears after-the-fact to have been an optimal strategy. Rather, courts are charged with enforcing the deals that parties actually make. That the parties, in two relatively terse contracts, chose to include in each an integration clause precludes Hill's reading.

This outcome is reinforced because Hill's argument also gives little weight to the Non-Competition Agreement's remedy provision requiring fee shifting in the event of Hill's breach. That provision directly conflicts with the Stock Purchase Agreement's arbitration clause because the arbitration clause requires

that "the parties shall bear their own costs, including attorneys' fees."[59] This fundamental conflict bolsters my conclusion that the Non-Competition Agreement did not silently embody a contractual commitment of the parties to arbitrate disputes arising from its alleged breach. It is a fundamental precept of contract interpretation that a "court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."[60] Because Hill's proposed interpretation would cause me to ignore the express contractual language in the Non-Competition Agreement's integration and remedial clauses, I cannot adopt it.

Hill's extra-textual arguments are also of no moment. Hill suggests that this court must wed the Stock Purchase and Non-Competition Agreements because Bombico indicated at his deposition that they together "memorialize[d] the repurchase of Mitch Hill's shares by Hough."[61] But, Bombico's subjective perception — that the Agreements were designed to embody the parties' deal with respect to a single business dynamic[62] — is inadmissible extrinsic evidence because there is nothing ambiguous about the Non-Competition Agreement's

[59] Wolfe Aff., Ex. 76 at § 2.
[60] *Council of Dorset Condo. Apts. v. Gordon*, 801 A.2d 1, 7 (Del. 2001).
[61] Bombico Dep. at 154.
[62] Bombico's testimony surrounding his comments linking the Agreements indicates that he was discussing the contracts in the business context of what documents comprised the entire transaction, not in the legal context of offering his understanding of where one Agreement stopped and another began. *See* Bombico Dep. at 151-54 (listing "five or six documents . . . that were signed at that time" including "other documents, resignations that took place at this time also").

text.[63] Equally important, the existence of a business relationship between the separate Agreements does not necessarily mean that rational contracting parties would conclude that the Agreements, in whole or in part, had to be interpreted and administered in the same manner. To the contrary, this very dispute illustrates why the parties may have chosen to employ a different method of dispute resolution in the Non-Competition Agreement. By its plain terms, that Agreement contemplated that Hough might need prompt injunctive relief against Hill if he breached its terms. In proceedings of that kind, it is not at all unusual for an employer to also seek injunctive relief against the competing employee's new employer, a party that will, for obvious reasons, not have signed up to arbitrate that dispute. Thus, both concerns that (i) arbitral processes providing injunctive relief might not be prompt enough and that (ii) it might be necessary to seek injunctive relief against third parties acting in concert with Hill might explain the Non-Competition Agreement's failure to require Hough to use arbitration to press claims asserting its alleged breach.

Finally, Hill's argument that I will undermine Delaware's public policy favoring arbitration if I refuse to order arbitration is incorrect. It is true that the public policy of this State favors enforcing agreements to arbitrate.[64] But, at

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[63] *See Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.").
[64] *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del. 1998) ("[T]he public policy of Delaware favors arbitration.").

bottom, that policy is only a manifestation of our State's respect for contractual freedom.[65] As such, courts should err on the side of enforcing arbitration when the issue of arbitrability is a close one, but should be wary that the "policy that favors alternate dispute resolution mechanisms, such as arbitration, does not trump basic principles of contract interpretation.[66] For that reason, I cannot re-write the fully-integrated Non-Competition Agreement to require allegations of its breach to be covered by the separate Stock Purchase Agreement's arbitration clause.

B. Hough Is Entitled To A Preliminary Injunction

Having concluded that Hough may proceed in this court, I take up its motion for preliminary injunction. The standard upon which a preliminary injunction will issue is well settled. The party seeking the injunction must establish: (1) a reasonable likelihood of success on the merits; (2) that imminent, irreparable harm will result if an injunction is not granted; and (3) that the balance of the hardships weighs in favor of issuing the order — i.e., that the injury to the plaintiff if the injunction does not issue will exceed the harm to the defendants or others if the injunction does issue.[67] I examine Hough's claims in light of each of these elements.

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[65] *See James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006) (stating that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002))).
[66] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155-56 (Del. 2002).
[67] *E.g.*, *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998) (citing *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989)).

1. Hough Has Demonstrated A Reasonable Likelihood Of Success On Its Breach Of Contract And Tortious Interference With Contract Claims

Hough seeks injunctive relief against both Hill and BE&K. As grounds for relief against Hill, Hough's asserts a breach of contract claim. To establish a reasonable probability of success on the merits of that claim, Hough must prove that the Non-Competition Agreement is enforceable, that Hill materially breached that Agreement, and that Hough suffered damages as a result of Hill's breach.[68] Hough's tortious interference claim against BE&K piggy-backs on its breach of contract claim against Hill. To prevail on its tortious interference claim, Hough must establish its prima facie breach of contract claim against Hill as well as prove that BE&K was aware of Hill's covenant not to compete and that, in the face of that knowledge, BE&K committed an intentional and unjustified act that was a significant factor in inducing Hill's breach.[69]

a. Hill Breached The Non-Competition Agreement

The first step in assessing Hough's breach of contract claim is to discern whether the Non-Competition Agreement is valid and enforceable. In general, a contract is valid if it manifests mutual assent by the parties and the parties have exchanged adequate consideration.[70] Contracts in restraint of competition are,

[68] *E.g.*, *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).
[69] *E.g.*, *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *12 (Del. Ch. 2004) (citing *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987)).
[70] *E.g.*, *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *2 (Del. Ch. 2004) (citing *Research & Trading Corp. v. Pfuhl*, 1992 WL 345465, at *9 (Del. Ch. 1992)).

however, subject to some special requirements. To wit, a covenant not to compete must be reasonable in geographic scope and temporal duration, must advance a legitimate economic interest of the party seeking its enforcement, and must survive a balancing of the equities in order to be enforceable.[71] Further, to gain specific performance of a covenant not to compete, these elements must be established by clear and convincing evidence.[72]

The Non-Competition Agreement satisfies these requirements. The parties' signatures on the Non-Competition Agreement after nearly six months review, and in the absence of any colorable claim of coercion, manifest mutual assent.[73] Adequate consideration was exchanged when Hough and Bombico gave Hill the prize he sought — a release from the nearly $290,000 in corporate debts — and gained, in return, Hill's ownership interest in the company, a portion of his accrued benefits, and a restriction on his ability to use the contacts, skills, and confidential information he acquired while a shareholder, director and employee of Hough in his future endeavors. Given what Hill got in exchange for agreeing to

[71] *E.g.*, *Tristate Courier*, 2004 WL 835886, at *10 & n.126.
[72] *See Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1201 (Del. Ch. 2001) (holding that when a "plaintiff ultimately seeks relief in the form of . . . specific performance, the court must keep in mind, in assessing the reasonable likelihood of success, that the plaintiff will bear the burden of establishing its case by clear and convincing evidence").
[73] Although Hill argues in his brief that he signed the Non-Competition Agreement because he was "[l]eft with no choice whatsoever if he wished to be free of the [corporate] debt," in his deposition, he agreed that his assent was given voluntarily and that he had not intimidated into scribbling his name. Hill Dep. at 158-160.

these restrictions — including the continuation of his employment — no doubts exist as to its enforceability.[74]

Hill's only argument against enforcing the Non-Competition Agreement's terms is that doing so would not advance any legitimate interest of Hough and therefore would impose a greater hardship on him. Specifically, Hill argues that enforcing his prohibition from working for BE&K will not allow Hough to regain its E&I subcontract with DuPont or cause the other members Hough's E&I Team (who had not signed covenants not to compete) to return to Hough. But Hill misconstrues both Hough's interests and the correct temporal perspective from which to view the Non-Competition Agreement's purpose. By securing restrictions binding Hill, Hough protected its legitimate economic interests by ensuring that if DuPont wanted to continue receiving E&I services from a team led by Hill, an accord of some kind would have to be reached with Hough. In other words, Hough safeguarded its investment in Hill and his E&I Team by ensuring that he could not sell himself directly to a competitor serving DuPont and cut out Hough.[75] The Non-Competition Agreement also prevented a rival like BE&K from enlisting Hill's assistance in putting together a cadre of other Hough

[74] "In Delaware, employment or continued employment may serve as consideration for an at-will employee's agreement to a restrictive covenant." *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *3 (Del. Ch. 2004).

[75] This is not to say that a competitor could not have bid for and possibly obtained DuPont's E&I work. But, if a party like BE&K sought to displace Hough at Edgemoor, it would have to do so with a new, less-experienced team leader — not poach Hough's 21-year veteran project manager.

employees to work for the rival in competition with Hough.[76] Bound by this restriction, Hill knew that if he wished to continue to provide E&I services lawfully at Edgemoor, he would have to keep working for Hough or bargain for a release.[77] Put simply, if the Non-Competition Agreement was honored by Hill and others, it gave Hough important leverage in protecting its business at Edgemoor.

The legitimacy of Hough's interest is not undermined simply because BE&K and Hill have now — by violating the terms of the Non-Competition Agreement — successfully displaced Hough at Edgemoor, nor does that state of affairs suggest that I should conclude that BE&K would certainly have ousted Hough even if it had not hired Hill and had instead told DuPont that it could not use him to lead its E&I unit. That post-hoc speculation is precisely what the Non-Competition Agreement's ex ante restriction on Hill was intended to avoid. There was a real world way for BE&K and Hill to test their current hypothesis — they could have respected the Non-Competition Agreement and BE&K could have attempted to convince DuPont to proceed without Hill. Because they chose not to

[76] *See* Wolfe Aff., Ex. 46 at § 1(a) (barring Hill from consulting for or assisting a competitor of Hough); *id.* at § 1(c) (barring Hill from helping another entity attempt to hire, solicit, or take away any Hough employee).

[77] Hill's covenant not to compete was also important to Hough because having denuded himself of any equity interest in Hough, Hill's personal interests no longer constrained him from considering greener pastures. Yet, he remained Hough's key employee at Edgemoor. Because of his unparalleled on-site expertise and his status as project manager, Hill was both Hough's greatest marketable asset at the site and its primary guardian for this important, long-standing, and profitable relationship with DuPont. For the same reasons, he was also positioned to do the most damage to Hough in the event of his disloyalty. Consequently, in the Non-Competition Agreement, Hough sought contractually to protect itself against that contingency.

follow that path, they cannot now profit in this litigation from the uncertainty their actions caused.

In sum, the Non-Competition Agreement protected Hough's legitimate interests and is an enforceable contract. Further, the harm to these interests satisfies the damage prong of the breach of contract inquiry. Thus, Hough's claims of breach are the lone remaining issue.

In its papers, Hough argues that Hill breached the Non-Competition Agreement in two major ways: (i) by accepting employment with BE&K (a former client of Hough's and its current competitor for the Edgemoor E&I work), and (ii) by aiding BE&K in soliciting Hough's employees.[78] Hill essentially concedes the first breach. He admits that he went to work directly for a competitor of Hough providing the very same E&I services that comprised his major work for Hough. This is hardly a trifle. Moreover, Hill's insistence that he did not commit any further breach of the Non-Competition Agreement's restrictions is not convincing. Hill kept secret from Hough the fact that BE&K was making offers to his Hough subordinates based, in part, on his references, and that he was working with BE&K to help it acquire his E&I Team intact.

[78] Although Hough raises three alleged breaches in its complaint — adding a disclosure of confidential information claim — and seeks a preliminary injunction based on each of these grounds, it does not press its disclosure claim in its briefs, choosing instead to focus on Hill's actual employment with BE&K and his role in helping BE&K retain the Hough employees.

The chain of e-mails Hill sent on June 28 indicate his knowledge of and complicity in BE&K's campaign of secrecy. That day, Hill told DuPont that he was aware that his Hough subordinates had "all been made offers [from BE&K] and [were] willing to accept them moving forward."[79] Yet, when he corresponded with Hough only minutes earlier, he only said that the members of the E&I Team had "begun exploring alternate possibilities."[80] That was no oversight. Hill told BE&K that even after receiving his earlier update, "no one at the Hough office [was] aware of the fact that interviews and subsequent employment offers ha[d] taken place."[81] Then, upon receiving BE&K's response entreating him not to "relate anything [to Hough] until [BE&K received] signed acceptances,"[82] Hill complied and did nothing to clarify his earlier correspondence. Even in his own resignation letter, and during his meeting with Hough the following day, Hill remained mum as to his involvement with BE&K.[83]

Additionally, Hill admitted that during his own job interview on June 23, he brought up his subordinates in conversation "for the purposes of saying good things about their qualities as employees" because he "knew at that point in time that all three of them were going to be applying for jobs at BE&K."[84] Thus, not only was Hill aware of information he never disclosed to Hough — i.e., that each

[79] Wolfe Aff., Ex. 55.
[80] Wolfe Aff., Ex. 54.
[81] Wolfe Aff., Ex. 24.
[82] Wolfe Aff., Ex. 58.
[83] *See* Wolfe Aff., Ex. 60.
[84] Hill Dep. at 235-38.

of his subordinates was actively pursuing employment with BE&K and that he was assisting them in that endeavor — but the information that he eventually did share with Hough five days later, on June 28, was misleading.

As I described more fully earlier in the opinion, there is a good deal of documentary evidence reflecting Hill's and BE&K's joint planning and their shared objective of keeping Hough unaware of key facts until the Hough E&I Team was firmly signed up with BE&K. Human nature being what it is, the written record is likely just the visible manifestation of the extensive collaborative efforts between Hill and BE&K whereby they jointly planned for BE&K to assume the Hough E&I Team basically intact. To that end, Hill gave BE&K positive evaluations of Hough team members (in a current business environment when employers are very careful about references) and worked with BE&K in securing the E&I Team's services so that BE&K could offer an E&I unit to DuPont that was in all material respects identical to the Hough E&I Team. Such conduct easily fits within the words in the Non-Competition Agreement restricting Hill from "hir[ing], solicit[ing], tak[ing] away, [or] accept[ing]" any of Hough's employees, directly or indirectly, alone or on another's behalf.[85] On this account, and as a result of Hill's more elemental breach of working for Hough's direct competitor, I find that he materially breached his covenant not to compete with Hough.

[85] Wolfe Aff., Ex. 46 at § 1(c).

b. BE&K Tortiously Interfered With Hough's Contract With Hill

Hough alleges that BE&K tortiously interfered with its contractual relationship with Hill by (i) offering him a job it knew Hill could not take without violating his obligations to Hough and (ii) enlisting Hill's assistance in soliciting Hough's employees in violation of his Non-Competition Agreement. On either point, there is no dispute that BE&K knew the Non-Competition Agreement prohibited his conduct. In fact, its executives had copies of the Agreement as of June 23.[86] Similarly, on Hough's first claim of interference, regarding Hill's employment with BE&K, BE&K does not contest that it offered Hill the job he now holds as "Project Manager" at the "Edge Moor Site" in an offer letter dated June 27.[87]

What BE&K does argue is that its conduct was not a substantial factor in causing Hill's breach because it decided not to understand the plain terms of the Non-Competition Agreement it was given, leaving the decision to breach on Hill's conscience alone. I find that defense unpersuasive. The most obvious thing Hill's covenant not to compete would cover would be a situation in which he went to work for a competitor to supplant Hough at Edgemoor. BE&K must have understood this, but chose to ignore it, figuring it was best to secure the E&I work

[86] BE&K points out that it was unaware of Hill's covenant not to compete with Hough when it initially targeted Hill as a "keeper" and "key" and therefore did not have a tortious state of mind in recruiting Hill. But, this claim rings hollow because even after BE&K was apprised of the Non-Competition Agreement on June 23, it still offered Hill employment, strategized and collaborated with him to achieve the hiring of Hough's E&I Team, and conspired with him to deny Hough information regarding its hiring activities.
[87] Wolfe Aff., Ex. 20.

at DuPont while the opportunity was present, then deal with any fall-out from Hough later. That decision is indicative of a tortious state of mind. Such a consciousness is confirmed by BE&K's secret dealings with Hill, which were confirmed by the e-mail exchange on June 28. Based on BE&K's conduct, it is probable that it knew that Hill was acting in a blatantly disloyal manner toward his employer, Hough, by negotiating with BE&K and helping BE&K solicit the Hough E&I Team, at a time when he was being paid by Hough to serve its interests and was bound by a Non-Competition Agreement that forbade that very conduct. Moreover, BE&K's tactical and intentional failure to come clean with Hough — and its instruction to Hill to keep his dealings with BE&K from Hough until the E&I Team officially committed to BE&K — serves as further proof that its acts were calculated to present Hough with a fait accompli at the time it discovered what had happened at the site.

Viewed in total, BE&K's conduct easily satisfies the substantial factor test. It engaged in furtive employment negotiations with Hill and collaborated with him to secure the services of his subordinates when it knew he was bound by a non-compete precluding that conduct. To hold that an entity like BE&K can engage in conduct like that with impunity would mean that it is open season for competitors to encourage employees to violate their covenants not to compete with their current employers. Employees, for many legitimate reasons, often desire to move elsewhere. But, when they have limited their freedom do so by entering into a valid non-compete, as Hill did, and their prospective employer knows it, that

employer acts at its own risk when it knowingly proceeds to sign up the employee and to engage in discussions forbidden by the non-compete with the employee.[88] By pursuing and executing such a course of action, the prospective employer knows that it is the recipient of services and assistance that the employee cannot provide without breaching contractual obligations to his prior employer.

BE&K was perfectly free to compete with Hough for the E&I work at Edgemoor. What it was not free to do was to employ Hough's contractually-restricted manager in that effort. On this basis, I conclude that Hough has shown a reasonable probability of success on the merits of its claims against Hill and BE&K. I therefore turn to the remaining elements of the inquiry whether to grant injunctive relief.

2. Hough Has Suffered And Will Continue To Suffer Irreparable Harm

Perhaps the most difficult question on this motion is whether to exercise my remedial discretion to issue a preliminary injunction. Because Hill and BE&K secured Hough's entire E&I Team for BE&K, there is an argument that even if an injunction issues, Hough will have been permanently crippled and will not have a chance to recoup the E&I work at Edgemoor. Furthermore, the very fact of this

[88] *See Tristate Courier*, 2004 WL 835886, at *12 (explaining that the court was "hard pressed . . . to find that parties with intimate knowledge of a covenant not to compete who nevertheless actively pursued [] the signatory to that covenant in order to engage in direct competition with the beneficiary of the covenant were not substantial factors in causing a breach of the non-competition agreement").

case and its disruption of DuPont's on-going work may have chilled DuPont's ardor for Hough's services.[89]

Hill and BE&K try to tilt me toward the view that an injunction would serve little purpose by arguing that even if they had not engaged in improper conduct, Hough had no chance to retain its role at Edgemoor. BE&K was intent on replacing Hough with itself and would simply have hired others, even if it could not have employed any of the members of the Hough E&I Team. Or, at least, so say they now.

But that self-serving argument rankles. If it was so clear that BE&K was capable of providing acceptable E&I services, even if the Non-Competition Agreement was honored, BE&K would likely have acted very differently. It would have ensured that Hough had early and clear knowledge that BE&K would displace it. It would have stayed away from Hill once it knew he had a non-compete because it would have been unimportant to get him and therefore clearly not worth engaging in legally questionable behavior. Certainly, it would not have worked secretly with Hill to keep the Hough E&I Team together and would not have held off on making offers to his subordinates until *after* it had obtained

[89] *See* Wolfe Aff., Ex. 62 (expressing Hill's impression that DuPont was "livid" with Hough and that the company had done itself "a world of political hurt/damage" by filing the present lawsuit).

references from Hill and learned of Hill's continued interest in serving as their leader. Why do all this if it really did not matter?[90]

At this stage, the inference I draw is that it possibly did matter. In prior transitions at Edgemoor, Hough's role was the constant. If BE&K could not guarantee continuity of service in the E&I area, it might have faced pressure from DuPont to retain Hough or come to terms with Hough on a financial package releasing Hill.[91] BE&K avoided those risks by proceeding as it did.

Doubtless there is uncertainty about what would have happened if the Non-Competition Agreement had been honored. That is precisely why our law has consistently found a threat of irreparable injury in circumstances when a covenant not to compete is breached. Measuring the effects of breaches like this involves a costly process of educated guesswork with no real pretense of accuracy.[92] This court has been candid to admit this reality and to use injunctive relief as the principal tool of enforcing covenants not to compete.[93]

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[90] *See Tristate Courier*, 2004 WL 835886, at n.147 (considering similar evidence in granting a preliminary injunction when third parties tortiously interfered with an employee's covenant not to compete by colluding with that employee to develop a competitive business).

[91] *See* Wolfe Aff., Ex. 63 at DP0210 (describing circumstances in which Hough may have been retained as E&I provider at Edgemoor).

[92] *See Singh v. Batta Environmental Associates, Inc.*, 2003 WL 21309115, at *9 (Del Ch. 2003) (explaining that it is "impossible to calculate with any certainty the full extent of the damage" inflicted by continued violation of a non-compete provision).

[93] *E.g.*, *Tristate Courier*, 2004 WL 835886, at n.147 (stating that "the harms resulting from competition by someone bound by a noncompetition agreement are frequently found to be irreparable" and rejecting "the argument that an award of damages would be sufficient to remedy any tortious interference with contract" in that context because "[d]isgorgement of profits . . . would not fully account for the impact on longstanding

For the reasons I averred to earlier, there is utility in this. Much of the benefit of a non-compete derives from its ability to create before-the-fact (ex ante) alterations to parties' behavior based on the threat of after-the-fact (ex post) injunctive relief in the event of breach. Unless parties like Hill and BE&K realize that injunctive relief should be expected in the event of a clear breach, non-competition agreements will not produce their intended effect, breaches will proliferate, and complicated damage inquiries into the "what might have been" world will ensue. The public policy of this State permits parties to limit the importance of such counterfactual inquiries by agreeing that breaches of their contracts will create irreparable harm and should be remedied by injunctive relief.[94]

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relationships"); *Singh*, 2003 WL 21309115, at *9 (holding that the "inadequacy of damages as a remedy, as well as the difficulty in calculating damages . . . constitute irreparable harm" sufficient to support an injunction); *Vitalink Pharmacy Services, Inc. v. Grancare, Inc.*, 1997 WL 458494, at *12 (Del. Ch. 1997) (awarding injunctive relief when "the Court could not measure with any reasonable degree of confidence the financial harm that [the plaintiff] would incur as a result of the Non-Competition Agreement violation."). The difficulty in quantifying damages has been recognized as a basis for granting preliminary injunctions in other contexts as well. *See T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536, 557 (Del. Ch. 2000) ("[W]here money damages 'may be highly difficult to calculate' preliminary injunctive relief is proper." (quoting *Sealy Mattress Co. of N.J. v. Sealy, Inc.*, 532 A.2d 1324, 1341 (Del. Ch. 1987))); *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 586 (Del. Ch. 1998) ("Preliminary injunctive relief may be appropriate when plaintiff's damages are difficult or impossible to quantify.").

[94] *E.g.*, *Gildor v. Optical Solutions, Inc.*, 2006 WL 1596678, *11 (Del. Ch. 2006) ("[A] contractual stipulation of irreparable harm is sufficient to demonstrate irreparable harm."); *Kansas City Southern v. Grupo TMM, S.A.*, 2003 WL 22659332, at *5 (Del. Ch. 2003) ("Although a contractual stipulation as to the irreparable nature of the harm that would result from a breach cannot limit this Court's discretion to decline to order injunctive relief, such a stipulation does allow the Court to make a finding of irreparable harm provided the agreement containing the stipulation is otherwise enforceable."); *True*

Indeed, this court has stated that the "primary goal of contract interpretation is to attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they contracted."[95] Consequently, to uphold this State's respect for private contracts, the Non-Competition Agreement should be enforced according to its plain terms, which, in this case, specify that Hill's breach would, by definition, cause irreparable harm to Hough and justify the entry of an injunction against him. No one has to sign a contract with such a provision, but when one does, he should not complain if the terms are given effect. In this regard, BE&K is also poorly positioned to complain about an injunction. Its conduct was hardly inadvertent and it was obviously aware of the terms of Hill's non-compete, including the remedial provision addressing irreparable harm and injunctive relief. It cannot claim surprise that an injunction might issue against it in the event that Hough complained of its conduct in employing and collaborating with Hill when that remedy was expressly contemplated by the Non-Competition Agreement it reviewed. For these reasons, I conclude that Hough faces irreparable injury in the absence of an injunction.

North Communications, Inc. v. Publicis S.A., 711 A.2d 34, 44 (Del. Ch. 1997) (confirming that a contractual stipulation alone can suffice to establish the element of irreparable harm and refusing to entertain a defendant's arguments opposing plaintiff's right to seek injunctive relief based on that provision), *aff'd*, 705 A.2d 244 (Del. 1997); *see also* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 12-3 (2005) ("In the context of applications for interim injunctive relief, the Court of Chancery consistently has held that contractual stipulations of irreparable injury resulting from breach are sufficient in and of themselves to establish the element of irreparable harm.").

[95] *See Delta and Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *3 (Del. Ch. 2006) (internal quotations omitted).

3. The Balance Of The Equities Weighs In Favor Of Granting Injunctive Relief

Recognizing that Hough was deprived of any opportunity to attempt to retain its employees or to keep the E&I business at Edgemoor while Hill and BE&K profited from obtaining that work, I find that each day this status quo continues in direct contravention of the Non-Competition Agreement harms Hough. Even with an injunction, Hough may be unable to recapture what it had. But, with an injunction preventing Hill and BE&K from providing the E&I services at Edgemoor, DuPont will necessarily look to meet its own needs, and may — particularly if Ancarrow and Draper return to Hough — seek out Hough to fill the void. Alternately, if BE&K desires to continue to perform the E&I services at Edgemoor, it may negotiate a release from Hough that will compensate Hough and allow the parties to move on with their businesses. In view of the equities, Hough deserves these opportunities.

The parties' failure to enter the same solar system in their discussions of what amount would provide fair recompense to Hough while allowing BE&K and Hill to soldier on confirms the necessity and reasonableness of injunctive relief.[96] Moreover, in view of their conscious decision to engage in concerted behavior

[96] Perhaps most difficult to estimate is what Hough has lost by having to risk offense to DuPont by even pursuing a remedy in this case, facing the Hobson's choice between allowing the violations of the Non-Competition Agreement to go without remedy and proceeding with a case that a large client, for whom it continues to perform other work, would likely find objectionable.

clearly involving a violation of the Non-Competition Agreement, the costs to Hill and BE&K of an injunction do not weigh heavily on the equitable scale.[97]

The only remaining consideration is whether the interests of others preclude entry of an injunction. As far as DuPont is concerned, it is a big outfit, capable of managing through an injunction, especially when, as a result of this order, DuPont will still retain the ability to select any E&I contractor (aside from BE&K) that it chooses. Any difficulty this re-selection process may entail will not be inequitable because of DuPont's own handling of this transition, which was hardly adroit and which displayed a goodly indifference about how BE&K went about ensuring that DuPont's desire to retain incumbents at Edgemoor was met. More important is a concern about the effect of an injunction on Ancarrow and Draper, Hill's two subordinates who followed him to BE&K. They did not have non-competes with Hough and appear to have been caught up this dispute only because their economic futures were at stake.

[97] Further, it appears that little harm will befall Hill if forced to walk away from Edgemoor. In a letter submitted by his counsel to the court days before this decision was rendered, Hill represented that he had obtained employment to begin on February 1, 2007 with "a company wholly unrelated to any of the parties in the pending action and in a position that in no way offends the Non-Competition Agreement." Fasic Letter at 1. Thus, the hardship Hill will bear from the injunction I will order will be only a brief layoff before he starts his new job. Even putting that important new fact aside, Hill admits that he has a number of viable employment options that do not implicate the Non-Competition Agreement. Hill Dep. at 279 ("I might go work at [a particular school] as a facility manager. I might utilize my FAA inspection license . . . to perform aircraft inspections.") & 234-35 (discussing other opportunities). BE&K is also poorly positioned to complain about an injunction. Its conduct was not inadvertent and it is a large contractor with many clients.

Considering these interests, I will tailor my injunctive order as follows. Hill will be enjoined for the "Non-Compete Period" defined in the Non-Competition Agreement[98] from continuing to work with BE&K, or any other firm providing services similar to Hough's, within 50 miles of Hough's headquarters. That injunction will obviously require him to refrain from providing E&I services to DuPont at Edgemoor except through Hough. The length of the restriction will run from the date an implementing order is entered. As to BE&K, it will be enjoined for the same Non-Compete Period from providing E&I Services to DuPont at Edgemoor or from profiting from the provision of those services under its prime contract with DuPont. Ancarrow and Draper, however, will remain free to continue to provide E&I services at Edgemoor, either directly as DuPont employees or contractors, or as employees of any contractor other than BE&K.[99]

IV. Conclusion

Based on the foregoing reasons, I hold that Hill's motion to compel arbitration is DENIED and Hough's motion for preliminary injunction is GRANTED. Hough shall submit a conforming order, upon notice as to form, within five days.

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[98] *See* Wolfe Aff., Ex. 46 at § 1(a) (defining the Non-Compete Period as "a period of five (5) years following the date of this Agreement or three (3) years after Seller's termination of employment with the Company, whether such termination is voluntary or for cause, whichever . . . is greater").

[99] Ancarrow and Draper are, of course, also free to continue to work for BE&K. But because BE&K will be enjoined from delivering E&I services at Edgemoor, they will have to change their role if they stay at BE&K. That inconvenience was visited upon them by BE&K and Hill.